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ENTERED



RON CURRY
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DERRITH WATCHMAN-MOORE
DEPUTY SECRETARY

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

May 20, 2003

Dr. Inés Triay, Manager
Carlsbad Field Office
Department of Energy
P.O. Box 3090
Carlsbad, New Mexico 88221-3090

Dr. Steven Warren, President
Washington TRU Solutions, LLC
P.O. Box 2078
Carlsbad, New Mexico 88221-5608

RE: **FINAL DETERMINATION, REQUEST FOR CLASS 1* PERMIT MODIFICATION
WIPP HAZARDOUS WASTE FACILITY PERMIT
EPA I.D. NUMBER NM4890139088**

Dear Drs. Triay and Warren:

The New Mexico Environment Department (NMED) acknowledges receipt of the following modification request to the WIPP Hazardous Waste Facility Permit:

- Request for Class 1* Permit Modification (PCBs), Letter Dated 5/16/03, Rec'd 5/19/03

On May 15, 2003, EPA Region VI notified the Permittees that it has approved the Department of Energy Carlsbad Field Office's application to allow disposal of polychlorinated biphenyls (PCBs) at the Waste Isolation Pilot Plant (WIPP) under the Toxic Substances Control Act (TSCA). The current WIPP permit explicitly prohibits the storage, management, or disposal of TRU mixed waste with PCB concentrations equal to or greater than 50 parts per million in Permit Condition II.C.3.f. The Permittees subsequently requested the subject permit modification to allow the implementation of the EPA approval to dispose of PCBs at WIPP.

The Permittees have indicated that they believe 40 CFR §270.42 Appendix I, Item A.8 would allow this permit modification to be processed as a Class 1 modification requiring director approval (i.e., a "Class 1*" modification). However, Appendix I.A.8 - *Changes to remove permit conditions that are no longer applicable (i.e., because the standards upon which they are based*

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are no longer applicable to the facility) is not an appropriate classification for this permit modification allowing the disposal of PCBs. There are several reasons for this:

1. Item A.8 was added to 40 CFR §270.42 Appendix I on September 30, 1999 (64 FR 52828). The current New Mexico Hazardous Waste Management Regulations only incorporate Part 270 as it was amended through July 1, 1999 (20.4.1.900 NMAC, *Adoption of 40 CFR Part 270*). Thus, the Permittees may not rely on Item A.8 for any permit modification. While the Permittees may have been granted approvals under Item A.8 in the past, NMED is not bound to inappropriately apply this provision now or in the future.
2. Even if 40 CFR §270.42 Appendix I.A.8 were incorporated by reference in the Hazardous Waste Management Regulations, it would not apply to a permit modification that does not result from a change in a regulatory standard. Item A.8 was added to 40 CFR §270.42 Appendix I in order to allow permit modifications resulting from changes in applicable standards under RCRA. In particular, EPA added the provision at Item A.8 to allow facilities to change permit conditions resulting from a removal of certain applicable air emission standards from RCRA, because the standards were deferred to the Clean Air Act. As the EPA stated at the time:

“Finally, with regard to the regulatory framework that will result from today's rule, we are eliminating the existing RCRA stack emissions national standards for hazardous waste incinerators, cement kilns, and lightweight aggregate kilns. That is, after submittal of the Notification of Compliance established by today's rule (and, where applicable, RCRA permit modifications at individual facilities), RCRA national stack emission standards will no longer apply to these hazardous waste combustors.” 64 FR 52834 (Sept. 30, 1999)

As the EPA explained when it adopted the change at Item A.8, the air emission standard was being removed from RCRA and deferred to the Clean Air Act, as reflected in 40 CFR §264.340(b), *Integration of the MACT standards*. As a result of this change in RCRA standards, EPA added Item A.8 to provide a method by which a RCRA permit could be modified to remove permit conditions that were based on standards that no longer applied to a RCRA facility.

In the current situation, no standard has changed. EPA Region VI has determined that the Permittees can safely dispose of PCBs at the WIPP facility under TSCA (15 USC §2601 et. seq.) and its regulations under 40 CFR Part 761. In doing so, EPA Region VI determined that the WIPP facility meets applicable standards under TSCA, but EPA Region VI did not change or eliminate the standard itself. Thus, no RCRA “standard” has been removed or made no longer applicable, and the provision in Item A.8 is not appropriate in the current situation.

It is clear that the Permittees cannot invoke Item A.8 until the Hazardous Waste Management Regulations have been updated to reference a later revision of 40 CFR Part 270, and after then only if the modification request seeks to remove permit conditions that are no longer applicable because the standards upon which they were based are no longer applicable.

Upon review of the modification request and the relevant regulatory standards, and because the Permittees did not request a class determination as allowed under 20.4.1.900 NMAC (incorporating 40 CFR §270.42(d)), NMED rejects this request for the reasons stated above. If the Permittees wish to resubmit the permit modification request for agency consideration, they should consult Appendix I to 40 CFR §270.42 to identify a more appropriate category and classification for the modification.

If you have any questions regarding this matter, please contact me at (505) 827-2855.

Sincerely,

A handwritten signature in dark ink, appearing to read 'Charles Lundstrom', with a long horizontal flourish extending to the right.

Charles Lundstrom
Director
Water and Waste Management Division

CL:soz (HWB)

cc: James Bearzi, NMED HWB
Steve Zappe, NMED HWB
Tracy Hughes, NMED OGC
Chuck Noble, NMED OGC
Tom Fitzsimmons, WA Dept. of Ecology
Laurie King, EPA Region 6
Betsy Forinash, EPA ORIA
Connie Walker, Trinity Engineering
Matthew Silva, EEG
File: Red WIPP '03